No. 645.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

JOSEPH LEE JONES and BARBARA JO JONES,
Petitioners,

v.

ALFRED H. MAYER COMPANY, a Corporation, ALFRED REALTY COMPANY, a Corporation, PADDOCK COUNTRY CLUB, INC., a Corporation, ALFRED H. MAYER, an Individual, and an Officer of the Above Corporations,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONERS.

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OPINIONS BELOW.

The opinion of the Court of Appeals (Printed at A. 50a et seq.), is reported at 379 F. 2d 33. The memorandum opinion of the District Court for the Eastern District of Missouri is reported at 225 F. Supp. 115 (Printed at A. 18a et seq.).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 26, 1967. The petition for writ of certiorari was filed on September 22, 1967, and granted on December 4, 1967. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The Constitution.

Article I, Section 8, Clause 3.

> The Congress shall have power to regulate Commerce with foreign nations, and among the several states, and with the Indian Tribes.

Article IV, Section 2, Clause 1.

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

Article IV, Section 2, Clause 3.

> No person held to Service or Labour in one state, under the laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered upon Claim of the Party to whom such Service or Labour may be due.

Article IV, Section 4.

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive

(when the Legislature cannot be convened), against domestic violence.

Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Statutes.

The Civil Rights Act of 1866, Act of April 9, 1866, Ch. 31, 14 Stat. 27, codified in Title 42 U. S. C., Secs. 1981 and 1982—set forth at Appendix p. 57 and p. 64.

Sec. 18 of the Enforcement Act of May 31, 1870, Ch. 114, 16 Stat. 144, codified in Title 42 U. S. C., Secs. 1981 and 1982—set forth at Appendix p. 63 and p. 64.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871, Ch. 22, 17 Stat. 13, codified in Title 42 U. S. C., Sec. 1983—set forth at Appendix p. 63 and p. 65.

QUESTIONS PRESENTED.

1. Whether the refusal to sell a lot and house, otherwise on the market, solely because of the race of the prospective buyer is prohibited by the Civil Rights Act of 1866, or its re-enactment in 1870.

2. Whether the Civil Rights Act of 1866 was validly enacted by Congress under authority granted by the Constitution.

3. Whether, regardless of statute, the state has sufficiently involved itself in the alleged discriminatory refusal to sell so as to make said refusal unlawful; by acts such as licensing, zoning, regulating, and otherwise promoting and assisting the subdivision development; by its delegation of municipal function to the developers; or by a combination of these factors.

STATEMENT OF THE CASE.

This case was filed in the United States District Court for the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and and 1871, codified in 42 U. S. C., Secs. 1981, 1982 and 1983, and under the Thirteenth and Fourteenth Amendments to the Constitution directly.

Inasmuch as this case arises from the affirmance by the Court of Appeals (A. 42a), of the order of the District Court sustaining the Respondents' motion to dismiss Petitioners' first amended complaint for failure to state a claim upon which relief could be granted (A. 14a), the facts pleaded by Petitioners in their first amended complaint (A. 3a-13a), must be taken as true.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, in consequence of an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, Petitioners decided that a particular type of home was well suited to their personal needs, convenient to their places of employment with agencies of the Government of the United States, and within their financial range (A. 6a).

Paddock Woods is a subdivision, owned and developed by the Alfred H. Mayer Company, a corporation engaged in the business of developing subdivisions in St. Louis County, including, not only Paddock Woods, but neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri which is the exclusive sales agent for the

homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., the other Respondent, is a corporation controlled by the other Respondents, which operates a golf course for the use of residents of the said "Mayer" subdivisions (A. 3a-5a). The Respondents will sometimes be referred to hereafter simply as "the developers".

After Petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the Respondents refused to sell them the house and lot because of the fact that Joseph Jones is a Negro, and because it is the Respondents' general policy not to sell said houses and lots to Negroes (A. 7a).

The governmental connections of the State of Missouri, its political subdivisions, and their various agencies with respondents and their housing subdivisions here involved are detailed in paragraphs 7 and 8 of the first amended complaint (A. 7a-12a). The allegations therein show a multiple panoply of state action. Not only are the Respondents themselves incorporated and licensed by the State of Missouri, but they also use the services of other state licensees, and of state and municipal offices, including the Building Commission, the Planning Commission, the Recorder of Deeds, the Metropolitan St. Louis Sewer District, the County Engineer and the Highway Department (A. 7a-8a).

In addition the developers use the services of state chartered lending institutions, title companies, surveyors and architects, and even go so far as to co-advertise with local public utilities such as the gas and electric companies (A. 8a-9a).

It is also alleged that the developers have been granted the right to build and regulate the small community of Paddock Woods (and the larger community including the adjacent "Mayer" subdivisions), just as if they were a political subdivision of the State of Missouri. In addition to completely governing the community during the construction stages, the developers retain a large degree of regulatory power thereafter, by means of restrictive covenants. A Board of Trustees appointed by the developers, in fact, has the power to levy assessments against the residents for community-wide services and maintenance of community facilities and areas, and to enforce them through liens and court proceedings (A. 9a-11a).

SUMMARY OF ARGUMENT.

1. The Civil Rights Act of 1866, 14 Stat. 27, by its plain meaning, creates the right for Negroes to purchase or lease any housing available on the market without discrimination based on race. The provision that "all persons . . . shall have the same right . . . to purchase, lease, sell, hold and convey real and personal property . . . as is enjoyed by white citizens" applies to individual sellers or lessors of residential property, who must, under its terms, make this property available without racial discrimination. The argument that this statute was intended merely to nullify "black codes" or other laws authorizing discrimination fails to take into account that such laws were nullified anyway by constitutional provision, and by other language within the statute itself providing, "all persons shall have the same right . . . to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens".

2. The legislative history of this statute, which was passed in March, 1866, re-enacted over the veto of the first President Johnson on April 9, 1866, and finally re-enacted again on May 31, 1870, after the ratification of the Fourteenth Amendment, clearly shows the intent to recognize or create the national federal right to obtain residential property without discrimination, regardless of state interference or state non-interference. The Civil Rights Act of 1866 was enacted at first solely under the power given Congress by the Thirteenth Amendment to remove the incidents of slavery. The Thirteenth Amendment was enacted to remove all discrimination in basic rights, which discrimination existed throughout the nation and had been given the authority of law by **Scott v. Sandford**, 19 How. 393 (1857), which held that even free Negroes were not entitled to the rights of citizens.

Although the statute was re-enacted after the ratification of the Fourteenth Amendment, Congress did not intend by this re-enactment, to limit the scope of the Act. If it had so intended it would have used limiting language. The holding of the court below that the re-enactment of this law, has somehow tainted it with a "state action" limitation does violence to the intentions of Congress and to prior decisions of this Court, recognizing that the law could stand on the Thirteenth Amendment alone.

3. The Civil Rights Act of 1866 can also be sustained under the Fourteenth Amendment. The opinions of this Court in **United States v. Guest**, 383 U. S. 745 (1966), and **Katzenbach v. Morgan**, 384 U. S. 641 (1966), indicate that the broad powers of Congress granted under Sec. V of the Fourteenth Amendment will no longer be limited by the **Civil Rights Cases**, 109 U. S. 3 (1883). That clause of first section of the Fourteenth Amendment which provides "nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws", was intended to prevent individual discrimination authorized by the silence of the states as well as that discrimination directly fostered by the state. This language was directed to "no state" not because the framers doubted that Congress had the power to prohibit individual discrimination, but because it was doubted whether Congress could prohibit positive state discrimination. Under **McCulloch v. Maryland**, 4 Wheat. 316, 421 (1819), and **Prigg v. Pennsylvania**, 16 Pet. 539 (1842), there was no doubt that Congress could prohibit individual denial of constitutional rights by "private action" alone, but because of the Tenth Amendment, the framers wanted to make sure that in addition, no state could authorize such discrimination by its laws under the police power. By language which is directed not to affirmative state action, but to denial by the state of equal protection the framers of the Fourteenth

Amendment intended to protect against the acts of any individual, not merely against a state's own acts.

Whether by eliminating the elusive concept of state action, or by broadening it to include failure to protect the Negroes' equal rights, this Court has in **United States v. Guest**, 383 U. S. 745 (1966), held that Congress has the power to protect the people of the United States against racial discrimination, whether such discrimination is committed by official agencies of a state or by private individuals acting within a state. Even if the statute could not be sustained under the Thirteenth Amendment alone, or under Sec. V of the Fourteenth Amendment alone, Congress would have the power to enact it under these Amendments considered together with the commerce clause, because the right to live, work and pursue happiness wherever a person may choose, free from discrimination based on color of skin is part of the specially protected right of travel between the states, upheld in **Crandall v. Nevada**, 6 Wall. 36 (1867); **Edwards v. California**, 314 U. S. 160 (1941), and **Heart of Atlanta Motel v. United States**, 379 U. S. 241 (1964). The Statute does not interfere with any valuable property right, as it merely means that property, if it is for sale or lease, must be sold or leased without discrimination. It is a valid means, perhaps the only valid means, to the constitutionally valid end of eliminating segregation and discrimination in housing, which is at the basis of the unconstitutional second-class citizenship of Negroes in this country. The Civil War was fought precisely to end this social evil, which is tearing our nation apart now, as it was then. Surely Congress has the power to enact this legislation or any legislation necessary to solve this most basic national problem.

4. Aside from any legislation, and conceding for purposes of argument that the affirmative state action requirement is still part of the law, there is sufficient state action

alleged in this case to require Respondents to deal with Petitioners in a non-discriminatory manner. The State of Missouri, and its political subdivisions, contribute by law and administrative action in countless ways to the building of Paddock Woods, and other segregated communities in St. Louis County.

But even without such a direct contribution, there is state action in this case. This action arises by way of the delegation of governmental and municipal functions to the developers. As in **Marsh v. Alabama**, 326 U. S. 501 (1946) and **Terry v. Adams**, 345 U. S. 461 (1953), where governmental functions are delegated to private individuals, corporations and groups, constitutional rights must be respected. The segregation achieved by the delegation of the right to build and govern Paddock Woods on a segregated basis is no different than segregation achieved by direct legislation in **Buchanan v. Warley**, 245 U. S. 60, 79 (1917). The state should not be allowed to do indirectly what it can not do directly. The discrimination of the developers is, therefore, barred by the Fourteenth Amendment above, because it is the act of the state's authorized delegate.

ARGUMENT.

I. The Civil Rights Act of 1866 prohibits discrimination because of race in the sale of housing.

Section 1 of the Act of April 9, 1866, 14 Stat. 27 entitled, "An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication", provides as follows:

> "That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."[1]

The Statute was first enacted by Congress under authority of the Thirteenth Amendment, Sec. 2, in the attempt to eliminate slavery and all the badges thereof.[2]

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[1] In codifying this section, it was divided into two parts, but the language remains essentially the same. See 42 U. S. C., Secs. 1981 and 1982 (App., p. 64).

[2] As to the purposes of the Thirteenth Amendment, see J. ten Broek, "The Antislavery Origins of the Fourteenth Amendment" 143-44 (1951).

After the ratification of the Fourteenth Amendment this law was re-enacted pursuant to Section 5 thereof.[3]

The law applied to all of the United States, and not just to the "freedmen" in the southern states. It follows that the bill was intended not just to prohibit the actual owning of a slave, but also to remove the incidents thereof, including the stigma which attached to being Negro by virtue of the decision of this Court in **Scott v. Sandford**, 19 How. 393 (1857), wherein it was held that even free Negroes were of an inferior class who were not entitled to any of the rights of ordinary citizens.

Although the 1866 Act itself uses the broadest imaginable language, it has been argued that the Congress merely intended by this law to repeal the "black codes" and other state statutes providing for discriminatory treatment of Negroes. Aside from the fact that the Thirteenth Amendment, and subsequently the Fourteenth Amendment, made these laws unconstitutional without such a statute, it can be clearly shown from the legislative history that Congress was well aware that the incidents of slavery could be re-imposed by the discriminatory conduct of individuals condoned by the silence of state legislatures, as well as by the direct action of state legislatures.[4]

It would have been relatively easy for Congress to provide that no state shall pass a law containing discriminatory provisions based on race, but Congress did not do this. Instead Congress enacted a law creating certain positive rights for Negro citizens, which rights it considered to be the fundamental rights of citizenship.[5]

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[3] As to the purposes of the Fourteenth Amendment, see footnotes 8 and 9 below.

[4] See Frank & Monroe, "The Original Understanding of 'Equal Protection of the Laws'," 50 Colum. L. Rev. 131, 138-140 (1950).

[5] The enumeration of the rights protected is reminiscent of Mr. Justice Washington's summary of the fundamental priv-

In creating this remedy, Congress, knowing the ingenuity of the human mind and the self-perpetuating nature of racial prejudice, did not seek to enumerate the means by which these fundamental rights could be denied, but simply forbade their denial by any means.

The argument that this law was passed merely to overthrow the "black codes" or discriminatory legislation is also belied by the very words of the law, which go much further. In addition to giving the right to sue, be parties, and give evidence, the statute gave the right to make and enforce contracts. Thus the Congress recognized that the right to enforce a contract in court would be valueless, if no one would contract with a Negro; and provided that racial discriminations could not be made in the act of contracting or refusing to do so. Furthermore, since the statute gives Negroes equal rights to make and enforce all contracts, the specific right to buy, sell and lease property must include the equal opportunity to buy any given piece of property, which is up for sale, or else it would be a meaningless addition to the right to make contracts.

Moreover, in addition to providing for Negroes the "full and equal benefit of all laws and proceedings for the security of person and property," which in itself would make illegal all discriminatory laws as to Negroes' rights to hold property, as well as discriminatory conduct by administrative officials such as Recorders of Deeds in denial of such rights; Congress provided that Negroes should have the same rights as white citizens to inherit, purchase, lease, sell, hold and convey real and personal property.

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ileges of citizenship in **Corfield v. Coryell,** 4 Wash. C. C. 371, 6 Fed. Cases 546, 557 (E. D. Pa. 1823), which included:

> "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety . . . the right of a citizen of one state to pass through or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise . . ., to take, hold and dispose of property either real or personal . . ."

Although the court below raised the question as to whether or not Congress intended to create a duty to sell without discrimination (A. 61a-62a), it is clear that if this language is to be given any meaning at all, it must at least be interpreted to mean that a person cannot be refused the right to buy or lease property solely because of the color of his skin. It is not argued, of course, that anyone must sell or lease his property just because a Negro wants to buy it. It is merely argued that if an owner is selling or leasing his property, he must not discriminate against any prospective or potential buyer simply because of the color of his skin.

Congress did not intend to create an illusory right to purchase, dependent upon the will of the sellers in the market to sell. If such is the case, the Joneses have no real right to live anywhere in St. Louis County, or for that matter in the State of Missouri, or any of the States of the United States. If the sellers are allowed to exclude Negroes from one area, they are equally allowed to exclude Negroes from all areas. Certainly, Congress did not mean to allow the owners and sellers of real estate to create the two "separate but equal" real estate markets, for Negroes and whites, which exist in the metropolitan St. Louis area, and in other areas of this nation.

At the time this statute was enacted, there were few, if any, Negro property owners in the United States. Congress in enacting this law, was attempting to support the Thirteenth (and later the Fourteenth) Amendments, not to repeal them. To interpret the law as leaving the right of Negroes to locate themselves throughout the United States to the mercy and charitability of the white owners of property would be to prevent the aims and intentions of Congress.

Thus, from the language of the statute, as well as from its legislative history, it is clear that Congress has created

a law giving all persons the equal opportunity to participate in the housing market, regardless of race, which cannot be used as a factor in refusing to participate in the sale or lease of housing.

II. Title 42, U. S. C., Sec. 1982, was validly enacted by Congress pursuant to the Thirteenth Amendment.

It has frequently been recognized by this Court that Sec. 1982 was enacted in 1866, before the Fourteenth Amendment had been proposed or ratified.

Mr. Justice Bradley stated in the **Civil Rights Cases**, 109 U. S. 3, 22 (1883):

> "Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color, and without regard to previous condition of servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens. . . . .
>
> "We must not forget that the province and scope of the Thirteenth and Fourteenth Amendments are different. . . . The Amendments are different, and the powers of Congress under them are different. What Congress has power to do under one, it may not have power to do under the other. . . . Under the Thirteenth Amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, **may be direct and primary, operating on the acts of individuals, whether sanctioned by state legislation or not;**

under the Fourteenth, as we have already shown, it must necessarily be and can only be corrective and afford relief against state regulations or proceedings." (emphasis supplied)[6]

The Court below seemingly held, however, that on the basis of dicta in **Hurd v. Hodge**, 334 U. S. 24, 32, 33 (1948), and **Corrigan v. Buckley**, 271 U. S. 323, 330-331 (1925), Sec. 1982 was infected in some way by a "state action" requirement. This holding ignores the express language of the Thirteenth Amendment, which makes no reference to States, and the express language of Sec. 1982. Furthermore, it assumes that by re-enacting the law, Congress intended to limit its scope. Surely, if Congress had desired to limit the scope of Sec. 1982, it would have repealed it or rewritten it rather than re-enacting it verbatim. The clear intention of re-enactment was to give additional weight and remove any possible doubt as to its validity.

Certainly, the authority of **Corrigan v. Buckley**, 271 U. S. 323, 330-331 (1926), has been weakened by **Hurd v. Hodge**, 334 U. S. 24 (1948) itself, which held unenforceable the same type of racially restrictive covenant enforced in **Corrigan v. Buckley**. The language of Mr. Justice Vinson in **Hurd v. Hodge**, is at most dictum, which is not in harmony with either the prior or subsequent opinions of this Court cited above.

It is respectfully suggested that this Court, where it is constitutionally possible, should uphold the Act of Congress rather than to find ways of invalidating it simply because Congress enacted it twice in order to be sure it

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[6] Accord: **Buchanan v. Warley**, 245 U. S. 60, 78 (1917); **Clyatt v. United States**, 197 U. S. 207, 216 (1905); **United States v. Price**, 383 U. S. 787, 802, 804-5 (1966). The contrary implications of the Court and of Mr. Justice Bradley in **Virginia v. Rives**, 100 U. S. 313 (1879), were apparently overruled by the **Civil Rights cases**. 109 U. S. 3 (1883).

was valid. If Sec. 1982 can be upheld under the Thirteenth Amendment, the Fourteenth Amendment, or any other section of the Constitution, Petitioners urge that the Court should uphold it.

The only decision prior to this case, which directly involved the validity of this statute, was in the case of **United States v. Morris**, 125 Fed. 322 (E. D. Ark. 1903), in which Judge Treiber in a well-reasoned opinion held the act to be valid on the basis of the Thirteenth Amendment stating:

> "That Congress assumed that its power was derived from the amendment, and not from either of the later amendments, is conclusively shown by the fact that at the time this law was enacted, in 1866, neither the fourteenth nor fifteenth amendment had been ratified, or even submitted by Congress to the states * * * The language of the thirteenth amendment differs materially from that used in the two later ones. While the fourteenth amendment provides that 'no state shall make or enforce any law which shall abridge,' etc., and the fifteenth amendment declares that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account * * *', the thirteenth amendment declares, 'Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction'. There is no limitation in that amendment confining the prohibition to the states, but it includes everybody within the jurisdiction of the national government. . . .
>
> "In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect citizens of the United States in the enjoyment of those rights which are fundamental and belong to every

citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment. . . . .

"That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable, and a conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)." 122 Fed. 322-324, 330, 331.

Other provisions of the Civil Rights Act of 1866 have also been upheld as validly enacted under the Thirteenth Amendment. See **U. S. v. Rhodes**, 1 Abb. 28, 27 Fed. Cases 785, 793-4 (D. Ky. 1866); **In Re Turner**, 1 Abb. 84, 24 Fed. Cases 337 (1867); **Smith v. Moody**, 26 Ind. 299 (1866). In the case of **United States v. Cruikshank**, 1 Woods 308, 25 Fed. Cases 707 (D. La. 1874), the court was dealing with the Act of May 31, 1870, 16 Stat. 140 (1870), but its comments as to the power of Congress under the Thirteenth Amendment are equally applicable to the Civil Rights Act of 1866. The Court stated at 25 Fed Cases 711-712:

"As disability to be a citizen and enjoy equal rights was deemed one form or badge of servitude, it was supposed that Congress had the power under the amendment, to settle this point of doubt, and place the other races on the same plane of privilege as that occupied by the white race.

"Conceding this to be true (which I think it is) Congress then had the right to go further and enforce its declaration by passing laws for the prosecution and punishment of those who should deprive, or attempt to deprive, any person of the rights thus

conferred upon him . . . It cannot be doubted therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise of the rights and privileges conferred by the Thirteenth Amendment and the laws passed in pursuance thereof . . .

"If in a community or neighborhood composed principally of whites, a citizen of African descent . . . should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of race or color, it cannot be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race . . ."

See also **United States v. Price**, 383 U. S. 787, 804-5, and the appendix at 383 U. S. 807 (1966) with respect to the purposes of the Enforcement Act of 1870, which was necessarily intended to apply to individuals, because the states were helpless to act, or protect Negroes, even when they wanted to do so.

Mr. Justice Harlan, in his dissenting opinion in **Hodges v. United States**, 203 U. S. 1, 29-33 (1906), said the same thing in relation to the Civil Rights of 1866, 14 Stat. 27. He dealt precisely with the questions of the power of Congress under the Thirteenth Amendment as follows:

"The 13th Amendment, it is conceded, did something more than to prohibit slavery as an institution, resting upon distinctions of race, and upheld by positive law. My brethern admit that it established and decreed universal civil freedom throughout the United States. But did the freedom thus established involve nothing more than exemption from actual slavery? Was nothing more intended than to forbid one man

from owning another as property? Was it the purpose of the Nation simply to destroy the institution, and then remit the race theretofore held in bondage, to the several States for such protection, in their civil rights necessarily growing out of freedom, as those States, in their discretion, might choose to provide? Were the States against whose protest the institution was destroyed, to be left free, so far as national interference was concerned, to make or allow discriminations against that race, as such, in the enjoyment of those fundamental rights which by universal concession, inhere in a state of freedom? Had the 13th Amendment stopped with the sweeping declaration, in its 1st section, against the existence of slavery and involuntary servitude, except for crime, Congress would have had the power, by implication, according to the doctrines of **Prigg v. Commonwealth of Pennsylvania**, repeated in **Strauder v. West Virginia**, to protect the freedom established and, consequently, to secure the enjoyment of such civil rights as were fundamental in freedom. That it can exert its authority to that extent is made clear, and was intended to be made clear, by the express grant of power contained in the 2d section of the Amendment.

"That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the 13th Amendment may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights Act of 1866. Whether that Act was authorized by the 13th Amendment alone, without the support which it subsequently received from the 14th Amendment, after the adoption of which it was re-enacted with some additions, my brethren do not consider it necessary to

inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the 13th Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the Act of 1866, passed in view of the 13th Amendment, before the 14th was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property as is enjoyed by white citizens; that under the 13th Amendment, Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not.".

Inasmuch as this Court recognized the broad extent of Thirteenth Amendment congressional power in even the **Civil Rights Cases**, 109 U. S. 3 (1883), it is unrealistic at this late date to impose a "state action" requirement on Thirteenth Amendment legislation.

The **Civil Rights Cases**, 109 U. S. 3 (1883), can be distinguished from this case precisely on this point. The right to sit in the dress circle at the theater or opera, or to ride in the "ladies car" or even to stay in a hotel involved in that case (denominated "social rights" by Mr. Justice Bradley) were not protected under the Civil Rights Act of 1866, which only applies to the basic and fundamental civil rights. Although Congress has now seen

fit to specifically protect these less important civil rights by legislation upheld by this Court,[7] it was in 1866, under the Thirteenth Amendment, seeking only to protect the most basic and fundamental rights. Of all these, the right to choose a place to live and work, without the burden of racial discrimination, would certainly seem to be the most basic.

III. The Civil Rights Act of 1866 was validly re-enacted pursuant to Authority granted to Congress by the Fourteenth Amendment.

Sec. 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sec. 5 provides:

> "The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Although it may be argued that the right to equal opportunity in housing is one of the basic privileges of citizenship, secured by Article IV, Sec. 2, and by that clause of the Fourteenth Amendment which protects the privileges and immunities of citizens of the United States, and although it can also be argued that the denial of this right is a deprivation of liberty and property without due

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[7] **Heart of Atlanta Motel, Inc. v. United States**, 379 U. S. 241 (1964).

process of law,[8] Petitioners call attention primarily to Sec. 5 of the Fourteenth Amendment, and to that clause which provides:

> "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

Although this Court seemingly held in the **Civil Rights Cases**, 103 U. S. 9 (1883), that Congress had no power under the Fourteenth Amendment to legislate against acts of individuals denying equal protection, because the act of an individual is not the act of a state, the Court has never struck down Sec. 42 U. S. C., Sec. 1982, specifically, and in fact has referred to its provisions as an aid to interpretation of the Fourteenth Amendment. **Buchanan v. Warley**, 245 U. S. 60, 78 (1917).

As Mr. Justice Goldberg pointed out in his concurring opinion in **Bell v. Maryland**, 378 U. S. 226, 292 et seq. (1964), one of the prominent purposes of the Fourteenth Amendment was to provide a firm constitutional basis for the Civil Rights Act of 1866, and to eliminate any doubt about its validity under the Thirteenth Amendment alone.[9]

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[8] See **Kent v. Dulles**, 357 U. S. 116 (1958), where the denial of the right to travel was so treated.

[9] In H. Flack, **The Adoption of the Fourteenth Amendment** (1908), the purposes of the Fourteenth Amendment are carefully explored.

Rep. Bingham, who introduced the equal protection clause and had voted against the Act of 1866, because he felt that it was beyond the constitutional power of Congress, clearly intended by this Amendment to give Congress the power to declare what rights were protected and to protect such rights by direct action. Flack, *supra*, at 79-81. No one in fact questioned that the Fourteenth Amendment would achieve this purpose, some feeling that the Amendment would not only give authority for the Civil Rights Bill (which was subsequently re-enacted pursuant to the additional Fourteenth Amendment authority), but that the Fourteenth Amendment actually made the principle of the Civil Rights Act a part of the Constitution itself, forever securing the fundamental rights of all citizens, be they black or white. Flack, *supra*, at 90, 95-97, 136-139.

The fact that the Fourteenth Amendment was intended to give Congress the power to prohibit discriminatory conduct by individuals as well as States, had been documented by all historical authorities.[10]

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[10] Flack, who was in sympathy with the outcome of the **Civil Rights Cases,** concluded:

> "However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. The evidence given in this chapter but corroborates and strengthens that given in the previous chapters as to the meaning of the Fourteenth Amendment, while all that has gone before sustains the position and contentions of those who advocated the several measures considered in this chapter. This does not mean that those measures were wise or just, and should have been passed, but it merely means that, according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several State Legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by States." Flack, *op. cit., supra* at p. 277.

In the exhaustive article by John P. Frank and Robert P. Munroe, "The Original Understanding of 'Equal Protection of the Laws'," 50 Colum. L. Rev. 131 (1950), it is concluded that the commonly given interpretation that the equal protection clause applies only to affirmative state action is "so foreign to the conception of those who passed the amendment that no real assessment of it can be made in terms of reconstitution attitudes," 50 Colum. L. Rev., at 131, 162. The Civil Rights Act of 1866, *id.* 150, as well as the Civil Rights Act of 1875, *id.* 158 and 160, are cited as conclusive authority that the Congress of the time of the enactment of the Fourteenth Amendment had no doubt that the power was given to prohibit individual denial of the fundamental rights on account of race.

Carl Schurz, Senator from Missouri, spoke most eloquently on the purposes of the Civil War Amendments during the debates on the 1870 Act. (Cong. Globe, 40th Cong., 1st Sess., 3607-8):

> . . . We are charged with having revolutionized the Constitution of the country by the amendments recently ratified; and that charge is reiterated so often that we have reason to suppose our opponents must consider it a crushing argument. Well, sir, I do not deem it necessary to

If the Fourteenth Amendment had been intended only to prohibit the affirmative discriminatory action of states, it would simply have provided that no State should discriminate; but instead the language goes much further,

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enter a plea of "not guilty." On the contrary, I acknowledge the fact, and I suppose the Republican party is by no means ashamed of it. Yes, sir, this Republic has passed through a revolutionary process of tremendous significance. . . . What was that constitutional revolution which the Democrats denounce as so fearful an outrage? In order to understand it fully, we must cast a look back and see what the constitutional polity of the United States was before the civil war, according to the Democratic interpretation of the Constitution then prevailing.

. . . We remember also that the slave power, finding itself at war with the conscience of mankind, condemned by the enlightened spirit of this age, menaced by adverse interests growing stronger and stronger every day, sought safety behind the bulwark of what they euphoniously called local self-government, and intrenched itself in the doctrine of State sovereignty. . . .

Finally that structure of fallacies, still so overshadowing but ten short years ago, tumbled down. . . . It was finally overthrown by the shock of the great revolution. **And what did that revolution put in its place? It gave us three great amendments to the national Constitution. . . . And all three empower Congress to pass appropriate legislation for their enforcement.**

That is the result of the great constitutional revolution. What does this result signify? **The war grew out of the systematic violation of individual rights by State authority. The war ended with the vindication of individual rights by the national power.** The revolution found the rights of the individual at the mercy of the States; it rescued them from their arbitrary discretion, and placed them under the shield of national protection. It made the liberty and rights of every citizen in every State a matter of national concern. Out of a republic of arbitrary local organizations it made a republic of equal citizens—citizens exercising the right of self-government under and through the States, but as to their rights as citizens not subject to the arbitrary will of the States. **It grafted upon the Constitution of the United States the guarantee of national citizenship; and it empowered Congress, as the organ of the national will, to enforce that guarantee by national legislation.** That is the meaning of that great revolution; and if Democratic Senators denounce the bill at present before us as its offspring they are welcome. I accept the name. (Emphasis supplied).

and says that no State shall deny equal protection to all persons within its jurisdiction.

As was stated by Mr. Justice Brennan in **Bell v. Maryland,** 378 U. S. 226 (1964), the pervading purpose of the Thirteenth, Fourteenth and Fifteenth Amendments was to securely and firmly establish the freedom of the newly made freed-men and citizens and to protect them "from the oppressions of those who had formerly exercised unlimited dominion over him." Mr. Justice Brennan went on to state that discrimination is a relic of slavery, and segregation a substitute for the Black Codes, thus clearly recognizing the intent of the framers of the Amendment to prohibit racial discrimination of all types.

Even Mr. Justice Bradley, in the **Civil Rights Cases,** recognized that the wrongful denial of civil rights by an individual could only take place if authorized by a state, and that the State could not constitutionally authorize such an action by individuals. To get around this admission, Justice Bradley resorted to the fiction that the individual who committed the active discrimination, would render himself amenable to satisfaction or punishment in accordance with laws of the State where the discrimination was committed, 109 U. S. 3, 17 (1883).[11]

This Court has frequently recognized that a State denies equal protection by taking action which expressly allows an individual or a group of individuals to discriminate, even though the State does not directly participate in or even condone the discrimination. In **McCabe v. Atchison, Topeka & Santa Fe Ry Co.,** 235 U. S. 151 (1914), it held invalid a law permitting (but by no means requiring or recommending) railway companies to haul sleeping or chair cars to be used by whites or

[11] Mr. Justice Goldberg pointed out in **Bell v. Maryland,** 378 U. S. 226, 308-9 (1964), that the assumption of state remedy is generally inapplicable, and is no longer appropriate.

Negroes exclusively. In **Terry v. Adams,** 345 U. S. 461 (1953), it held that the exclusion of Negroes from voting in a private organization's pre-primary was invalid. In **Reitman v. Mulkey,** 387 U. S. 369 (1967), a state constitutional amendment permitting discrimination in sales or rental of housing which was previously illegal by virtue of state statute was struck down. **Brown v. Board of Education,** 347 U. S. 483 (1954), and **Aaron v. Cooper,** 358 U. S. 1 (1958), made it illegal to permit the operation of segregated public schools. The Fifth Circuit in **Bowman v. Birmingham Transit Co.,** 280 F. 2d 531 (5th Cir. 1960), found it illegal for the State to permit a private company to operate segregated busses. In **Marsh v. Alabama,** 326 U. S. 501 (1946), it was held that a privately owned company town could not deny constitutionally protected rights of free speech.

In **Shelley v. Kraemer,** 334 U. S. 1, (1948), and **Barrows v. Jackson,** 346 U. S. 249 (1953), this Court held that a State could not permit private individuals to perpetrate segregation by use of its Courts to enforce by injunction or award of damages private agreements in the form of restrictive covenants to bar Negroes from housing.[12]

In **Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961), it was held to be illegal for a State to permit a

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[12] The involvement of the state in these cases consisted of merely making available its courts to enforce private agreements. If, for instance, the Joneses had tendered their check to the developers and simply camped out on the lot in Paddock Woods and the developers had brought an action to evict them, as they would undoubtedly have the right to do under Missouri law, we would have exactly the same state involvement as in **Shelley v. Kraemer.** See **Abstract Investment Co. v. Hutchinson,** 204 Cal. App. 2d 242, 22 Cal. Rep. 309 (1962), forbidding use of courts by private landlord to evict tenants because of race. See also **Garner v. Louisiana,** 368 U. S. 157 (1961), Mr. Justice Douglas concurring at pp. 178-184; **Lombard v. Louisiana,** 373 U. S. 267 (1963), Mr. Justice Douglas concurring at pp. 279, 280.

restaurant operating as its lessee to bar Negro customers. In **Smith v. Holiday Inns of America**, 220 F. Supp. 1, 9-10 (N. D. Tenn. 1963), **aff'd** 336 F. 2d 630 (6th Cir. 1964), it was held, before the enactment of the Civil Rights Act of 1964, that a privately owned motel, which had bought its land from the Nashville Housing Authority, was prohibited from discriminating against Negroes.

In addition, the Court has recognized that a denial of civil rights can result from the failure of the State to act, as well as from its affirmative discrimination. In **Baker v. Carr**, 369 U. S. 186 (1962), failure to redistrict in accordance with constitutional requirements was held to create a cause of action, and in **Catlette v. United States**, 132 F. 2d 902 (4th Cir. 1943), failure by the state to protect the constitutional rights of an individual, resulted in conviction of a sheriff.

It would follow that under the broad powers granted to Congress by Sec. V of the Fourteenth Amendment, it can enact legislation preventing the denial of civil rights by private action due to the failure of the State to protect those rights, as well as such denial due to the positive act of the State. Indeed, the greater part of the discrimination which takes place in this country is done without specific authority of State law, but with the tacit consent of the State.

This Court has in recent decisions uniformly held that the power of Congress with respect to the enactment of laws for the protection of civil rights will be respected.

In **Katzenbach v. Morgan**, 384 U. S. 641 (1966), this Court specifically upheld the power of Congress under Sec. 5 of the Fourteenth Amendment to enact legislation forbidding the denial of the right to vote to persons educated in the Spanish language, simply because they cannot speak English.

In **South Carolina v. Katzenbach,** 383 U. S. 301 (1966), the Court upheld action by Congress under Sec. 2 of the Fifteenth Amendment, which is exactly similar in scope with Sec. 5 of the Fourteenth Amendment, to prohibit the denial of equal voting rights, whether by the state officially or by individuals.

In **United States v. Guest,** 383 U. S. 745, 762 (1966), Mr. Justice Clark concurring, joined by Mr. Justice Black and Mr. Justice Fortas, stated:

> "the specific language of Sec. 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."

In the same case, Mr. Justice Brennan, concurring, joined by Mr. Chief Justice Warren and Justice Douglas, stated:

> "a majority of the members of the Court express the view today that Section 5 empowers Congress to enact laws punishing **all** conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under color of state law are implicated in the conspiracy. Although the Fourteenth Amendment itself, according to established doctrine, 'speaks to the State or to those acting under the color of its authority', legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Sec. 5 authorizes Congress to make laws that it considers are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise

of such a right is necessary to its full protection . . .

"I acknowledge that some of the decisions of this Court, most notably an aspect of the **Civil Rights Cases**, 109 U. S. 3, 11, have declared that Congress' power under Sec. 5 is confined to the adoption of 'appropriate legislation for correcting the effects of . . . prohibited State laws and State acts . . .' I do not accept and a majority of the court today rejects —this interpretation of Sec. 5. It reduces the legislative power to enforce the provision to that of the judiciary; (citations omitted) and it attributes a far too limited objective to the Amendment's sponsor."

Justice Brennan then applies the classic test of the constitutionality of legislation, stated in **McCulloch v. Maryland**, 4 Wheat. 316, 421 (1819):

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

He goes on to state:

"It seems to me that this is also the standard that defines the scope of congressional authority under Sec. 5 of the Fourteenth Amendment . . .

"Viewed in its proper perspective, Sec. 5 of the Fourteenth Amendment appears as a positive grant of legislative power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and political equalty for all citizens." 383 U. S. 745, 781-784.[13]

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[13] The out-of-slant perspective which would limit Congressional power under Sec. V of the Fourteenth Amendment can be corrected by reference to **Prigg v. Pennsylvania**, 16 Pet. 539

With the doctrine announced in the **Guest** case by Mr. Justice Brennan it has become clear that this Court will no longer restrict Congress's legitimate scope of action in protecting civil rights denied to Negroes by white majorities, with the tacit consent or permission of their government.

Regardless of whether or not one takes the view that the requirement of "state action" derived from the **Civil Rights Cases**, 109 U. S. 3 (1883), has been completely nullified by the more recent holdings of this Court,[14] or

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(1942), where the court upheld federal legislation granting an individual the right to make a claim upon another individual for return of a slave, or a person alleged to be a slave, under Art. IV, Sec. 2, Clause 3 of the Constitution, which stated:

> "No person held to service or labor in one State, under the laws thereof, escaping into another shall, **in consequence of any law or regulation therein,** be discharged from such service or labor, but he shall be delivered up on claim of the party to whom such service or labor may be due." (Emphasis supplied.)

Mr. Justice Storey justified this legislation's application to private individuals by stating "that the local legislation may be utterly inadequate to furnish appropriate redress and that the state legislation may be entirely silent on the whole subject". Mr. Justice Storey was not troubled by lack of any express power in Congress to legislate, and went so far as to state that Congress's power was exclusive. 16 Pet. 539, 611, 613, 616, 618.

If this Court were to apply the same zeal to the right of Congress to legislate to protect the civil rights of citizens under the Fourteenth Amendment, which contains an express grant of legislative power, and is not specifically limited to events occurring "in consequence of any law or regulation", as was in **Prigg** applied to the right of Congress to protect the slave-owner, there would be no difficulty in recognizing the validity of Sec. 1982.

[14] The concept of state action is described by Charles L. Black, Jr. in "Foreword, State Action, Equal Protection and California's Proposition 14", 81 Harv. L. R. 69, 95 (1967), as follows:

> "It now exists principally as a hope in the mind of racists (whether for love or profit) that somewhere, somehow, or to some extent, community organization of racial discrimina-

the view that "state action" has been re-interpreted more in line with actual language of the Amendment, prohibiting any state from denying equal protection by allowing individuals or groups to discriminate within the State, it is clear that Sec. V of the Fourteenth Amendment gives Congress broad power to define the protection of civil rights which it finds appropriate for citizens and persons within the United States. Congress has by Sec. 1982 protected the rights of Negroes to participate equally in the housing market with whites, and the means chosen by Congress to achieve this great purpose were reasonably calculated to bring it about.[15]

In sustaining the Civil Rights Act of 1964, in **Heart of Atlanta Motel, Inc. v. United States,** 379 U. S. 241 (1964), barring discrimination in hotels, restaurants and other places of public accommodation, this Court relied on the power of Congress to regulate discriminatory practices which have a substantial affect on interstate commerce. The commerce clause, Art. I, Sec. 8, Clause 3 of the Constitution, was expressly excluded from consideration in the **Civil Rights Cases,** but it is obvious that discrimination in housing has a much greater effect on commerce than discrimination in public accommodations, because discrimination in housing keeps Negroes at a distance where they cannot successfully compete for

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tion can be so featly managed as to force the Court admiringly to confess that this time it cannot tell where the pea is hidden."

[15] As to the power of Congress under Sec. V of the Fourteenth Amendment, see also Mr. Justice Douglas concurring in **Heart of Atlanta Motel v. Katzenbach,** 379 U. S. 241 (1964). who would have rested the opinion on that ground alone if necessary. See also the separate concurrences in that case of Mr. Justice Goldberg, and Mr. Justice Black, who, although not considering whether the case could rest on Sec. V alone, applied the same constitutional test of legislative propriety under the Thirteenth, Fourteenth and Fifteenth Amendments as under the Commerce Clause itself.

jobs,[16] and where they cannot send their children to adequate integrated schools.[17]

The right to choose a place to live is in fact the most basic civil right of all, because it affects every aspect of a person's life—the kind of job he can find, the kind of

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[16] There can be no right more basic to our survival as a free and democratic nation than the right of each person to seek a livelihood for himself in the location of his choice. The cost of the bar against Negroes in the suburbs of St. Louis is graphically illustrated by the fact that between 1954 and 1964, the number of available jobs in St. Louis County, where Paddock Woods is located, increased by 47,600 while the number of jobs in the separate entity of the City of St. Louis decreased by 9500. Between 1950 and 1960 the non-white population of St. Louis increased by 62,000 while the white population decreased by 214,377. Negroes constitute 36% of the population of the City of St. Louis where 22% of the families earn less than $3,000.00 a year. In St. Louis County, where only 7% of the families earn less than $3,000.00 per year, Negroes constitute only 2.7%, most of these living in impoverished "pocket ghettoes" left over from the days before suburban living became the preferred way to escape from integrated schools.

> City of St. Louis, Application to the Dept. of Housing and Urban Development for a Grant to Plan a Comprehensive City Demonstration Proposal, April 26, 1967, p. 7.

[17] The Missouri Commission on Human Rights reported in 1961 that no significant advance had occurred in desegregating Missouri's public schools. (Report of U. S. Commission on Civil Rights, **50 States Report**, p. 357.) It recommended:

> "That immediate steps be taken to free housing from racial and religious restrictions, thereby eliminating racial ghettoes, which perpetuate racial segregation in the schools in spite of sincere efforts of boards of education to put an end to such segregation" (at p. 358).

The United States Commission on Civil Rights reported in 1967 that segregation in public schools has increased over the last 15 years, particularly in northern cities. (Report of U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967), at 8, 199.)

The racial isolation between city and suburb, made possible by state governmental boundaries and the delegation of housing functions to private developers, which is the subject matter of this action, is described by the Commission, which concludes:

> "The organization of school districts would not be of special significance if the racial and socio-economic groups

school to which he can send his children, and in fact the candidates for whom he can vote. Since housing is so closely tied to our representative system of government, it is essential that the right to live anywhere without discrimination be enforced. It cannot be denied that the voting power which Negroes would normally have, as a minority of over 20,000,000 people has largely been nullified by housing discrimination, which keeps the Negroes in congested voting districts, where they can only elect a certain number of representatives, and limits the impact they would have as a "swing group" if they could spread themselves out in a normal manner. It means that the representatives of our suburban and white rural regions can continue to ignore the Negro's problems, because they have successfully excluded Negroes from their constituencies.

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they served were fairly representative of the entire metropolitan area. But city and suburban school districts generally serve separate economic, social, and racial groups." (Idem. at 200.)

The Commission stated also,

"In large part, the separation of racial and economic groups between cities and suburbs is attributable to housing policies and practices." (Idem. at 20-25.)

going on to describe the means by which segregation is carried out by tacit cooperation of private industry, local government and Federal government.

This full report of the Commission goes on to outline the total failure of compensatory education plans in trying to make "separate" education equal, and the startling evidence that desegregation itself has a profound beneficial effect on the general performance of students (idem. at 120-140), concluding among other things that the finding of this Court that segregation "affects the hearts and minds of children in ways unlikely ever to be undone" applies to segregation compelled by housing discrimination as well as to that segregation compelled only by mandatory school segregation laws (idem. at 193). Its conclusions (idem. at 193) and findings (idem. at 199) go to the heart of the public policy involved in this case.

The Supplementary Statement at p. 213 of Mrs. Frankie Freeman who aside from being a Commissioner is Chief Counsel for the St. Louis Land Clearance for Redevelopment Agency and the St. Louis Housing Authority is also most revealing.

Petitioners contend that it simply is not a proper function of any government, or any group of people, to determine that any group shall be excluded from living within its boundaries, because it allows a manipulation of representation, which is incompatible with democracy, and which in the long run, if allowed to continue unchecked, will destroy representative government itself. One of the primary purposes of the republican form of government guaranteed by Art. IV, Sec. 4 of the Constitution is to secure certain rights to members of minority groups, which cannot be taken away. If the majority group is allowed to nullify the voting power of minorities, by setting up its own artificial boundaries, we no longer have this protection, but we have in effect a continuation of slavery. [18]

The constitutional right to travel without hinderance throughout the various parts of the United States, protected in **Heart of Atlanta Motel v. United States**, 379 U. S. 241 (1964), has frequently been recognized by this Court as specially protected. In **Crandall v. Nevada**, 6 Wall. 36, 43-44 (1867), this Court, in striking down an attempt to levy a tax on that right, stated that government offices of necessity had to exist throughout the land, and that citizens necessarily must have the unrestricted right to travel to these offices both to work there as government officers and to transact their business with the government.[19] As Mr. Justice Stewart stated in

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[18] The point that the balance of powers between state and federal government was intended by the framers of the Constitution to protect the individual against the abuses of the majority, and that federal non-intervention in matters involving the protection of federal rights against abuse by local authorities goes against the grain of the Constitution itself is developed in a note entitled "Theories of Federalism and Civil Rights," 75 Yale L. J. 1007 (1966).

[19] It is worthy of note that the Joneses at the time of filing this suit were both employees of the United States government, working for the Veterans Administration (A. 3a).

United States v. Guest, 383 U. S. 745, 757 (1966), the right to travel from one State to another occupies a position fundamental to the concept of federal union.

The right to live in any place in the United States, Petitioners suggest, is an essential part of the right to travel in any place in the United States, which, as noted above, has always been granted special protection by our constitution. The Court in **Edwards v. California**, 314 U. S. 160 (1941), based this right on the fact that its denial was a constitutional burden on interstate commerce. Mr. Justice Douglas in concurrence, joined by Mr. Justice Black and Mr. Justice Murphy, placed the right as one of the fundamental rights of national citizenship, relying on **Crandall v. Nevada**, supra; **Williams v. Fears**, 179 U. S. 270, 274, and the **Slaughterhouse Cases**, 16 Wall. 36; 75-79 (1873). Mr. Justice Jackson, also concurring stated:

> "This court should, however, hold squarely that it is a privilege of citizenship in the United States, protected from state abridgement, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence thereof. If national citizenship means less than this, it means nothing.
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> "Property can have no more dangerous, even if unwitting enemy, than one who would make its possession a pretext for unequal or exclusive civil rights . . .
>
> "Unless this Court is willing to say that citizenship of the United States means at least this much to the citizens, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." 314 U. S. 160, 183-185 (1941).

The right to purchase or rent housing, free of discrimination, claimed by the Joneses, is basic to their rights

as citizens of the United States. Since this Court has now sustained civil rights legislation as to public accommodations and employment, it should not have any difficulty in sustaining Sec. 1982 as to housing. In the first place the interference with property rights of others is much less. Sec. 1982 merely tells property owners they cannot discriminate in disposing of the property. A person who sells a house, obviously has no important protectible interest in who buys it. Even in a lease situation, the landlord is rarely in personal contact with his tenant, and really has no valid interest in who rents the property other than to see that the rent is paid and that the property is not damaged.

For reasons similar to these, there has long been a policy in the law against too many restraints as to future alienation or use of property.

This Court has already approved the right of Congress to prohibit discrimination in the personal relationship which arises between the proprietor of a public accommodation and his customer, and the still more personal continuing relationship between employer and employee. In correctly ruling that the interest of the Negro in obtaining equal access to public facilities and to employment outweighed the property rights of the proprietors and employers, the Court has made it easy to decide this case, which involves an even more basic right of the Negro to live where he can get a job and be enabled to use public accommodation facilities, as weighed against a less important property right of the residential property seller or landlord, who will ordinarily not be forced to have any further substantial contact with the buyer or tenant, once he has sold or leased the property to him.

The property right of the owner, often referred to by real estate people, is in fact surrounded by all sorts of restrictive laws, as to easements, building lines, height

regulations, sanitary conditions, zoning, housing standards. Many of these regulations, some of which are justified on the grounds that they contribute to the value of the property, are much more restrictive than Sec. 1982, which does not in any way affect the property itself. It is clear that the so-called property rights of white owners consist of no valuable right, but merely the right to maintain exclusive residential districts.[20]

This right is insignificant in comparison to the right of the Negro purchaser or lessee to participate in our society on the same basis as white people.

It is submitted that Sec. 1982 protecting the fundamental civil right to obtain housing without discrimination based on race, can be sustained, either under the Thirteenth Amendment alone or under Sec. V of the Fourteenth Amendment alone. If any doubt remains as to the power of Congress under these Amendments, the law can be sustained by consideration of the power of Congress under these Amendments, together with its power under the Commerce Clause.

IV. If "state action" must be found in order to sustain Petitioners' position, that "state action" exists abundantly in this case.

Although Petitioners contend that the Civil Rights Act of 1866, as a Congressional enactment, is sufficient to

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[20] Sometimes the argument is made that the introduction of Negroes into a neighborhood reduced property values. Although the argument itself has been proven false by L. Laurent, **Property Values and Race** (1960), and D. McEntire, **Residence and Race** (1960), it is obvious, that even if the argument were true, it would disappear if Negroes were free to move wherever their pocketbooks could take them, because there would no longer be any way to manipulate the market. The present pattern of movement on a "blockbusting" basis, with all whites fleeing after the first Negro family moves in, and the whole block turning Negro in a short time, is dependent upon the artificial restriction of purchasing of housing by Negroes.

decide this case without reaching the question of "state action," they also urge that regardless of that statute, Petitioners ought to prevail. The Constitution itself mandates that these Respondents may not racially discriminate against these Petitioners.

It is now clear beyond peradventure that neither the Federal government, nor any State, nor any governmental creature or official of either, may discriminate on racial grounds. See, **e. g., Brown v. Board of Education,** 347 U. S. 483 (1954). It is clear that governmental involvement limited to a property-law connection with a discriminatory use, for instance, racially discriminatory use of property leased from a government, will subject the leasehold and the lessee to constitutionally mandated non-discrimination, to the same extent as if the government operated the leasehold itself. See, **e. g., Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961). And it is clear beyond cavil that any substantial affirmative government aid given any person in the carrying out of his activities will subject those activities and that person to the same constitutional requirements which would govern the assisting government. See, **e. g., Reitman v. Mulkey,** 387 U. S. 369 (1967); **Simkins v. Moses H. Cone Memorial Hosp.,** 323 F. 2d 959 (4th Cir. 1963), **cert. denied** 376 U. S. 938 (1964).

On the facts of this case, the affirmative aid given Respondents by the State of Missouri and its various governmental subunits (See First Amended Complaint, para. 7. A. 7a-9a) would be sufficient to charge Respondents with the State's own constitutional responsibilities. But while it might be sufficient for this case to focus on the aid given Respondents by the State, there is another way of viewing the facts of this controversy: **one may look not at what the government is doing for Respondents, but at what Respondents are doing for the government.** Government action is a form of action, not a form of

organization; one no more needs a government for governmental action, than one needs a corporation for corporate action, or an articled partnership for a conspiracy. If what is being done by a person is governmental **action**, that **action** is subject to the requisites and standards of the United States Constitution whether carried out by a *de jure* governmental entity or official or not. And behind that proposition lies not only reason and policy, but an abundance of authority.

One line of that authority, the white-primary cases commencing over forty years ago with **Nixon v. Herndon**, 273 U. S. 536 (1926), is particularly piquant, because it so clearly illustrates the slow but apparently inexorable shift of judicial focus from what the state was doing to what was being done for the state. In **Nixon v. Herndon**, *supra*, a Texas statute barring Negroes from voting in election primaries was declared unconstitutional. In response to that decision the State of Texas repealed the offending provision, substituting for it another, which provided that the executive committees of the various political parties might set the voting requirements for their primary elections. The same Mr. Nixon who had sued the first time apparently had the energy to try again, and once again he won. **Nixon v. Condon**, 286 U. S. 73 (1932). But his victory, if not pyrrhic in the long run, was disastrous for the nonce. For the ground of the second decision was that the State, because it had mandated by statute that party **executive committees** should determine voting criteria, was still involved in the primary electoral process, which therefore could not be discriminatorily run. What the Court was impliedly saying was that if a state left voting criteria to the parties alone, without further instruction, the Constitution would not reach the parties' decisions, even though the result would be an all-white primary. The result of this focus on "state" rather than "action" (in the familiar rubric) was predictable: Texas

deleted the reference to party executive committees, and the Court validated the Texas procedure. **Grovey v. Townsend**, 295 U. S. 45 (1934).

Grovey lasted ten years. In **Smith v. Allwright**, 321 U. S. 649 (1944), it was expressly overruled. And that overruling was precisely on the ground that the function, the process, the activity involved was "state action", even though not carried out by the State.

> . . . because of the recognition of the place of the primary in the electoral scheme makes clear that **state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function** that may make the party's action the action of the State. 321 U. S. at 660 (emphasis added).

And the Court went on specifically to note that a state could not avoid its duties ". . . by casting the electoral process in a form which permits a private organization to practice racial discrimination. Constitutional rights would be of little value if they could be thus indirectly denied." 321 U. S. at 664.

In **Smith v. Allwright**, however, there was some remaining statutory connection between the State and the primary process, even though that connection was far short of voter-qualification controls. The **Smith** opinion was not absolutely, limpidly clear that its basis was solely the state-**function** argument, and that the decision would have come out the same way even if there were **no** statutory connection between the State of Texas and the primary process. See 321 U. S. at 662-64. Shortly after the **Smith** decision one court did read it to mean that a primary was a "state action" even with no state statutory connection. In response to Texas' defeat in **Smith**, South Carolina had repealed **all** state laws having **anything** to do with primaries. Faced with that situation, the Fourth

Circuit decided flatly that a state could not ". . . by permitting a party to take over part of its election machinery . . . avoid the provisions of the constitution forbidding racial discrimination in elections. . . ." **Rice v. Elmore**, 165 F. 2d 387, 389 (4th Cir. 1947). That was certainly clear enough, but certiorari was denied, 333 U. S. 857 (1948), and the question remained technically open.

For four years only. In 1952, **Terry v. Adams**, 375 U. S. 461 (1952), was decided. That case involved the "Jaybird" political organization, a sort of pre- or sub-party "club" in a Texas county. It had been founded in 1889 (**i. e.**, by no stretch of the imagination could it be deemed an evasive response to **Smith v. Allwright**), and it was clear that the State did not regulate the Jaybirds. But the Jaybirds held "elections", the winners of those "elections" ended up on the Democratic primary ballot, and the Jaybirds, of course, did not allow Negroes to vote. The Court firmly held that the activities of the Jaybirds constituted "state action" for constitutional purposes. After quoting its earlier language from **Smith v. Allwright** about "delegation of a state function" (quoted above) the Court went on to restate the **ratio** of that case even more strongly:

> For a state to **permit** such a duplication of its elections processes is to **permit** a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment. . . . It violates the Fifteenth Amendment for a state, by such circumvention, to **permit** within its borders the use of any device that produces an equivalent of the prohibited election. 345 U. S. at 469 (emphasis added).

Now, this forty-year progression is instructive. In culmination, with **Terry v. Adams**, it clearly involved a situation where the state-action component of the case was supplied, not by the state, but by the action. Defer-

ence to the earlier focus—that it must be a **government** which **does** something—may be seen in the repeated uses of the word "permit," a word which implies **some** governmental action. But the word "permit" describes an act only in a Pickwickian sense, for if the "act" of "permitting" is "state action," then **every** activity a private person is capable of doing, every Hohfeldian "power" which the state **could** forbid, would be "state action" subject to the strictures of the Fourteenth Amendment.

If one assumes that so sweeping a position was not intended in **Terry v. Adams**, then it must follow that there are only some **kinds** of "private" action which may not be carried out in a manner violative of the Constitution. What kinds?

If "state action" involves a certain kind of doing, not a certain kind of doer, what is the touchstone of that doing? **Marsh v. Alabama**, 326 U. S. 501 (1946), helps immensely to give form and contour to the answer to that question. **Marsh** involved members of a religious organization who attempted to distribute religious literature in a town which had "all the characteristics of any other American town" **except** that, like the community owned by Respondents in the instant case, it was wholly owned by a private corporation. When one of these proselytizers refused to desist, she was ejected and eventually convicted for refusing to leave private premises, the argument being that the First Amendment did not govern activities on private property. On appeal to this Court, it was accepted that the property was "private," but that was not found dispositive. "We do not agree," said the Court, "that the corporation's property interests settle the question." 326 U. S. at 504. Pointing out that an ordinance adopted by all of the residents of the "town" which sought to bar the dissemination of religious literature would have been clearly invalid, 326 U. S. at 505, the

Court held that no such restrictive power resided in the corporate owner of the community either.

But why not? Certainly each of the householders in the town, acting individually, could constitutionally evict religious proselytizers from their homes, calling upon police aid to do so if necessary; it has never been held that the First Amendment runs into one's living room, or that the use of police to help effectuate valid private rights necessarily turns their exercise into "state action." See **Peterson v. Greenville**, 373 U. S. 244, 247 (1963) and cases following; **cf. Watchtower Bible & Tract Society, Inc. v. Metropolitan Life Ins. Co.**, 297 N. Y. 339, 79 N. E. 2d 433 (1948). Why could not this private corporation call upon public police to evict proselytizers from its private property? Is this larger plot of private property, this so-called "town," any different from any other piece of private property from which, concededly, governmentally enforced exclusion would have been proper?

Of course it is. It is a town, a polis, an aggregation of public relationships no more analogous to a living room than the City of St. Louis. To pretend that the acts of that private, town-owning corporation were not governmental acts because it lacked political organization, would be about as reasonable as claiming that acts of General Motors Corporation were not corporate acts because one of its original incorporators was under age, or that a local sheriff's acts were not governmental because his election, years earlier, had been technically defective. What is important about **Marsh** is that in it the Court recognized and enunciated that "state action" is a matter of function, not organization; that given a certain functional reality, certain "private" activities transformed the actor, with respect to those activities, into a *de facto* government. The defendant in **Marsh**, a private corporation governing private property, was subject to the requirements of the First Amendment, not because it was

being helped in its goverance by the government, but because it was in itself a government, carrying out governmental activities.

If this explication of **Marsh** and the **White-Primary Cases** be adopted—that what determines "state action" is the function performed rather than the *de jure* organization of the performer—then a vast body of recent decisions attains intelligible and consistent shape.

It is unquestionable that there is a large and growing body of decisions in which racially discriminatory activity was forbidden under the Constitution even though the actual discriminator was not the government, or any agency or agent of the government. The common organizing principle used to explain most of these cases is to focus on the property-law relationship between the property involved and the government. In a large proportion of the cases, for instance, the government owned the fee to the property, and the discriminating private party was its lessee. See **e. g., Turner v. City of Memphis,** 369 U. S. 350 (1962); **Burton v. Wilmington Parking Authority,** 365 U. S. 715 (1961); **Muir v. Louisville Park Theatrical Ass'n,** 347 U. S. 971 (1954); **Greensboro v. Simkins,** 246 F. 2d 425 (4th Cir. 1957); **Derrington v. Plummer,** 240 F. 2d 922 (5th Cir. 1956); **Department of Conservation & Development v. Tate,** 231 F. 2d 615 (4th Cir. 1956), **cert. denied,** 352 U. S. 83 (1956); **Nash v. Air Terminal Service,** 85 F. Supp. 545 (E. D. Va. 1949). In at least one case no formal lease was involved, but it was held sufficient that a loan of public facilities was contemplated. **Statom v. Board of Comm'rs,** 233 Md. 57, 195 A. 2d 41 (1963). In still another case, **Hampton v. Jacksonville,** 304 F. 2d 320 (5th Cir. 1962), **cert. denied sub. nom. Ghioto v. Hampton,** 371 U. S. 911 (1962), an even more tenuous property-law nexus between the government and the affected property was found sufficient; when the government transferred a fee interest to a private party,

subject only to what may be classified either as a possibility of reverter or right of entry for condition broken, it was held that the grantee was charged with duties of non-discrimination. (And it should be noted that the critical breach of condition upon which the fee would revert was **not** integrated use by the grantee.)

Similarly, when what was involved in the discrimination was not real property, but a more incorporeal interest within the power of government to grant, a "private" grantee of such interest has also been held subject to the Constitution. See **e. g.**, the bus-franchise cases, **Public Utilities Comm'n v. Pollak**, 343 U. S. 451 (1952); **Boman v. Birmingham Transit Co.**, 280 F. 2d 531 (5th Cir. 1960); **Flemming v. South Carolina Electric & Gas Co.**, 224 F. 2d 752 (4th Cir. 1955). **And cf. Everett v. Riverside Hose Company No. 4**, 261 F. Supp. 463 (S. D. N. Y. 1966) (volunteer fire company).

Now, a property-nexus interpretation of these cases is perfectly accurate, and sufficient to explain them. If a government still "owns" property in some sense (and that sense is a very primary one if the government's interest is a fee), it is certainly sensible to hold that the Fourteenth Amendment may not be violated in the use of that government property. But that interpretation, focusing as it does on the government's property position, while a sufficient ground for the above cases, is not a necessary ground, or, it is submitted, the most accurate ground. There is another way of classifying all of the above cases, which not only rationally explains them, but permits a consistent and reasonable explanation of still other cases in which no property was left in the government at all.

To achieve that unifying explanation, one must again focus not on property but on function. And if one looks at what the discriminator (always a "private" person) in

each case was **doing** with the property granted or leased to him, the results are illuminating: **in each and every case the discriminating private person was engaged in carrying out a function of community-wide breadth which had previously or traditionally been carried out by a governmental body.** In other words, in each case the government's position as grantee or lessor was only a **symptom** of the real vice, discrimination in the provision of community services, rather than the vice itself. Since governments do not ordinarily hold, grant or lease property or powers except for the consummation of governmental functions, it is not surprising that in many cases wherein private parties carry out governmental functions there will be someplace in the history of the transaction a grant or lease from the government. But it is not the grant or lease which is the critical gesture, but the functions being carried out with the granted or leased property, which properly determines the reach of the Constitution.

Look at the cases cited above. **Turner v. City of Memphis, Burton v. Wilmington Parking Authority, Derrington v. Plummer,** and **Nash v. Air Terminal Service,** all involved eating facilities in public, community-serving buildings. **Muir v. Louisville Park Theatrical Ass'n, Hampton v. Jacksonville, Greensboro v. Simkins, Department of Conservation & Development v. Tate,** and **Statom v. Board of Comm'rs** all involved community recreation facilities—beaches, golf courses, theatres. **Public Utilities Comm'n v. Pollak, Boman v. Birmingham Transit Co.,** and **Flemming v. South Carolina Electric & Gas Co.** all involved community-service bus lines, while **Everett v. Riverside Hose Company No. 4** involved a local volunteer fire department. Is it reasonable, given the nature of the functions being carried out in all of these cases, that racial discrimination would be found permissible if the government theretofore or potentially involved had been canny enough to grant the land or the power to a discriminating "private" person with no strings attached?

There is certainly strong authority to the effect that the answer to that question is no. In **Smith v. Holiday Inns of America**, 336 F. 2d 630 (6th Cir. 1964), the defendant **purchased** land from a governmental authority. Such "controls" as the grantor-authority wrote into the contract of sale had no bearing upon the occupancy pattern of the defendant's motel, and were, in fact, nothing more than a local government, through zoning and building codes, could have imposed upon the defendant had the contract been silent. But the defendant-grantee's land was part of an extensive urban-redevelopment project, and he decided to discriminate racially in letting the rooms in his motel on that land. The Court said no. And it said no while fully cognizant of the difference between the case with which it was confronted, and those in which a continuing lease-hold relationship with a governmental agency existed, notably **Burton v. Wilmington Parking Authority**, *supra*. See 336 F. 2d 634-35. Why? **Because the motel was part of a governmental community project.** It was **not** that the property had once been owned by the government which was dispositive.

> We do **not** hold that the mere fact that a state agency once held title to a piece of property affects private title forever with some public quality. 336 F. 2d at 635 (emphasis in original).[21]

It was that the property was still being used to carry out a governmental purpose which counted.

> The single pervasive fact which defendants seek to ignore but which this court cannot is that this motel

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[21] It should be noted here that the reformulation argued for above might, in a few rare cases, serve to narrow the application of the equal-protection clause. If, for instance, a state acquired by foreclosing a tax lien the Polish-American Club building, and leased it to the Sons of Hellas, under the government-function (as opposed to the government-property) formulation, it is likely that the lessees would not be obligated to admit Turks or, presumably, Negroes, even if they were also Greek.

is part and parcel of a large, significant, and continuing public enterprise . . . 336 F. 2d at 634.

And finally, in 1966, this Court decided the case of **Evans v. Newton**, 382 U. S. 296 (1966). In that case a city, holder in trust of park land under a devise mandating use by white people only, allowed Negroes to use the park. Suit was brought to remove the city's trustees and appoint non-public ones. The city thereupon resigned as trustee. The state courts accepted that resignation and appointed private successor trustees. It was that action by the State courts which this Court reversed.

The premise of that reversal was that the state courts must have accepted the city's resignation, and appointed successor trustees, under the belief that such private trustees would be able to carry out the trust's segregating purposes, while the city clearly could not. See 382 U. S. at 302 and 382 U. S. at 303 (concurring opinion). Thus, the Court found it necessary to its decision to decide if indeed private trustees could constitutionally discriminate against Negroes in the operation of the park. And this Court decided that they could not, even though, with the substitution of the new trustees, **the city lost all property-law contact with the trust and the park.**[22] Integrating the meaning of **Marsh v. Alabama, Terry v. Adams, Burton v. Wilmington Parking Authority,** and **Public Service Comm'n v. Pollak** (all *supra*), this Court put its decision clearly and flatly on the ground that **there are some functions which are governmental functions no matter who it is in immediate charge of carrying them out.**

> The service rendered even by a private park of this character is municipal in nature. It is open to every

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[22] The Court did note that there was no evidence in the record that the City had ceased to provide care and maintenance to the park upon the appointment of substitute private trustees, but as there was no evidence to the contrary either, only brief attention was given to this evidentiary point. See 382 U. S. at 301.

white person, there being no selective element other than race. Golf clubs, social centers, luncheon clubs, schools such as Tuskegee was at least in origin, and other like organizations in the private sector are often racially oriented. A park, on the other hand, is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain . . .

. . . . . .

Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. 382 U. S. at 301-02.

We have been talking thus far about parks and beaches, buses and motels, **aspects** of a community, amenities in the life of a modern polis but peripheral to the heart of community life. **The instant case is about a community, a town, about public life itself.** When completed, Respondent's "town", access to which is denied Petitioners solely because of race, will house 1,000 people, and will be part of a larger complex of similar developments owned by Respondents which together will house 2,700 families. As **part** of this community there will be recreational facilities for golf, tennis and swimming. The streets will be open, and community-wide amenities like garbage collection will be communally provided. There will even exist the power to "tax" residents by levying assessments and collecting them judicially. Can an aggregation of power such as this, which in effect zones, polices, regulates and determines most of the important communal decisions for such a vast number of persons (see First Amended Com-

plaint, para. 8 (A. 9a-12a)) claim the right to discriminate against some persons solely on the ground of their color? If this power aggregate were politically chartered it could not. **Buchanan v. Warley,** 245 U. S. 60 (1917). If certain of the residents were given the power to decide whether or not to discriminate by voting on the question, that procedure would be impermissible. **Harmon v. Tyler,** 273 U. S. 668 (1927). If two or more residents of this "town" agreed with each other to discriminate racially, that agreement would be unenforceable. **Shelley v. Kraemer,** 334 U. S. 1 (1948). Is it possible that in this case, unlike **Marsh v. Alabama,** *supra,* ". . . the corporation's property interests settle the question" (see 326 U. S. at 504) and that **these** Respondents **may** racially discriminate? It seems unlikely.

It would be folly to pretend that the problems in this area are merely semantic, just the product of early juristic errors which have hardened into a clouded amber called "state action". Beneath the skin of that rubric lies the living heart of a painful paradox, a species of that generic conflict imbedded in the Constitution, the necessary clash between freedom and equality.[23] The wail of the householder—Why can't I sell my house to whomever I please? —is two parts pure racism and two parts pure fudge, but also, perhaps, one part mixed truth: every restriction upon property is a restriction upon personal freedom, and it is not necessarily un-American (certainly not historically) to resent such bondages, even if arguably for the common good. One should always keep in mind T. H. White's

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[23] The exquisite difficulty of the state-action question coupled with the pressing social importance of its "solution" has generated a massive outpouring of scholarly commentary on the doctrine. See the massive bibliography at 1965 **Duke L. J.** 222, n. 6, 231, n. 34. Among the most interesting articles directed to this issue since 1965 is Black, **"State Action," Equal Protection, and California's Proposition 14,** 81 **Harv. L. Rev.** 69 (1967).

great paradigm of what tyrannny is, the sign in the ant hill reading "Everything not forbidden is compulsory."[24]

But restrictions upon freedom are sometimes necessary; in a sense those restrictions **are** civilization. In the absence of any restrictions upon individual freedom, the life of man would most likely be "solitary, poore, nasty, brutish and short."[25] The essence of Anglo-American civilization is not, and cannot be, the absence of any restrictions upon perfect freedom, but rather the absence of any not requisite for the survival of decent and honorable communal life. That form of communal civilization cannot survive if vast aggregations of power are wholly free to impose their whims upon the less powerful. Thus, between government and man there can be no invidious discrimination. Nor can government lend its power (which includes its economic power) to any bloc, to tip the scales in its behalf. Nor even, in certain circumstances, may individuals consensually organize to discriminate by race, even if they but seek to do in concert what any single individual might do by and for himself. Nor (and this is critical) may any "person" with the *de facto* power and function of a *de jure* government do what that *de jure* government could not do.

Certainly it will be difficult to tell, sometimes, what is a community function and what is a private act. But it will often be very, very easy to do so. Consider for a moment the imaginary State of Neutrality, one of the states of the United States of America. Neutrality is a state which tends to husband its resources. It has no chartered municipalities, no police, no public schools, public housing, or public recreational facilities. It does not franchise or restrict common carriers or utilities. Neutrality, as a

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[24] **T. H. White, The Once and Future King** 122 (Dell Pub. Co. 1939).

[25] **T. Hobbes, Leviathan** 104 (Everyman ed. 1950).

state, meddles with no one. Naturally, the people of Neutrality have gotten together and set up schools, parks, swimming pools, bus lines, power companies and, of course, "housing developments"—none of which admit or give service to the minority class of Negroes in the State. I take it that on the position advanced by Respondents, those excluded Negroes would have no remedy under the United States Constitution with respect to **any** of those communal functions. And I further take it, that that is absurd. Those "private utilities", even unfranchised, would be "public utilities," and they could not racially discriminate. The "private police" would be just plain "police," and they could not decide to accept or protect only Whites. The schools, and maybe the pools, would be "public" too and covered by the Fourteenth Amendment. **And those "housing developments" would be towns, barred by the Constitution from discriminating on the grounds of race.**

Admittedly, questions grow closer in less hypothetical worlds. If, for instance, the "private" activity—school, pool, golf course—merely supplements rather than replaces governmentally (and non-discriminatorily) run facilities of the same sort, one might be inclined to allow the "private" group its discrimination, especially where this pattern of supplementation was historically justified (as seems clearly to be the situation in this country with respect to schools). And there would seem to be no reason to tamper with those organizations which are "communal" in only a very narrow sense, for instance the Sons of the Ukraine or the Daughters of Dublin, perhaps perforce ethnically limited but clearly "private" for all of that. In other words, most of the questions would be easy ones, albeit hard ones might remain, to be settled on a case-by-case basis.

But difficult as some of the questions one might think up could be, the question here, in **Jones v. Alfred H. Mayer**

Co., is not one of them. If the actions of a total community like the Respondents' is not "governmental" action subject to the strictures of the equal-protection clause, then **nothing** done by other than a *de jure* political organization or agent is subject to the Constitution. We submit that **such** a conclusion is neither Constitutionally credible, nor viable in today's America. To put it as this Court **has** put it, "Constitutional rights would be of little value if they could be thus indirectly denied." **Smith v. Allwright**, 321 U. S. 649, 664 (1944).

IN CONCLUSION.

For all the reasons set forth above, Petitioners urge that their Complaint states a cause of action upon which relief can be granted. The decision of the Court of Appeals for the Eighth Circuit should be reversed and the cause remanded to the District Court.

Respectfully submitted,

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